SUBJECT INDEX

	Page
Matter involved	1
Jurisdiction	2
Question presented	3
Reason for allowing writ	3
Brief in support of petition	7
Statement of case	7
Specification of error	8
Argument	9

TABLE OF CITATIONS

CASES

May Department Stores v. N.L.R.B., 326 U.S. 376, 90 L. Ed. 131	9

"SECONDARY AUTHORITIES"

Act of Feb. 13, 1925 as amended	2
National Labor Relations Act, 29 U.S.C. 151, etc.	2
Rule 38, Section 5	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

NORFOLK SOUTHERN BUS CORPORATION

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Supreme Court of the United States:

STATEMENT OF THE MATTER INVOLVED

Norfolk Southern Bus Corporation prays a review by certiorari of a judgment rendered against it by the Circuit Court of Appeals for the Fourth Circuit on the 30th day of December, 1946, in favor of National Labor Relations Board, enforcing an order of that Board, and holding that said Bus Corporation must bargain with a union (Brotherhood of Railway Train-

men) as the representative of the bus drivers and conductors of the Virginia Division of said Bus Corporation, holding that body an *appropriate unit* for collective bargaining under the National Labor Relations Act (29 U. S. C. Section 151, etc.), said Bus Corporation denying that this was an appropriate unit.

BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW

We maintain that this court has jurisdiction on certiorari because the Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by the Supreme Court, and has erroneously decided that the bargaining unit in question is an appropriate unit, although it represents a minority of employees, substantially identically situated, the majority of whom do not desire this bargaining. This question is of very grave importance, we submit, not only to the parties at bar, but nationwide. Furthermore, the decision of the Circuit Court of Appeals was by a divided count, with a powerful dissenting opinion, which we maintain is sound.

That there are special and important reasons for the highest federal court to decide the question at bar; and that there is full reason and jurisdiction in this court, pursuant to its Rule 38, section 5, and pursuant to the Act of February 13, 1925, as amended, 28 U. S. C. §347.

THE QUESTION PRESENTED

The question is, whether or not the so-called Virginia Division is an appropriate bargaining unit of the bus drivers and conductors of said Bus Corporation in the face of the fact that they are substantially identically situated with the other drivers and conductors of said Bus Corporation, and a great majority of all are opposed to the bargaining agent, and do not wish to join the union.

The vote in the election for bargaining agent by the so-called Virginia Division, was 34 for, and 30 against, while there were more than 100 drivers and conductors, counting both the Virginia and Carolina Divisions, all substantially identically situated, men on both divisions crossing the state line, and the majority of both divisions living in Norfolk, Virginia.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons for granting the writ and reviewing the case, are that an important question of federal law has been decided by a divided count, with, we submit, a correct dissenting opinion; and the matter is of grave future practical importance; and the decision as now rendered allows a minority in effect to rule against the wishes of the majority of drivers and conductors.

The reasons why the writ should be granted and the decision reversed are very clearly and concisely set forth in the dissenting opinion of Circuit Judge Soper, the closing words of which correctly state:

"Section 9(b) of the statute gives the Board the power to determine in each case the unit appropriate for purposes of collective bargaining to effectuate the policies of the Act; but the Act does not permit the Board to limit a bargaining unit to a certain size simply to enable the union to secure an organization in a plant which would otherwise be impossible. It is true that the preamble of the statute declares that it is the policy of the United States to encourage the practice and procedure of collective bargaining and to protect the exercise by the workers of the full freedom of self organization and the designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. But Section 9(a) provides that the bargaining representatives shall be designated by the majority of the employees IN AN APPROPRIATE UNIT and that they shall be the exclusive representatives of the employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

"We need nothing further than these provisions to show that the unit must be one which is appropriate for bargaining in respect to wages and other conditions of employment. In this case, as the Board has found, the WAGES AND WORKING CONDITIONS IN BOTH DIVISIONS ARE THE SAME AND THE PROBLEMS IN BOTH DIVISIONS ARE THE SAME AND THE PROBLEMS OF ADMIN-

ISTRATION ARE HANDLED BY THE COMPANY AS A WHOLE; and the real reason for setting up the Virginia division as a separate unit was not that it is an appropriate unit for bargaining purposes, but SOLELY TO ESTABLISH THE UNION IN THE BUSINESS AGAINST THE WILL OF THE MAJORITY OF THE EMPLOYEES. What is the inevitable result? It is that the REPRESENTATIVES OF A MINORITY WILL HAVE THE AUTHORITY TO BARGAIN FOR THE WHOLE BODY OF EMPLOYEES. This is true because it will be obviously impossible for the company to make any distinction between the bus operators in the two divisions since they have the same qualifications, are closely associated in the performance of their duties, and are subjected to the same conditions of labor.

"NO DECISION OF THE SUPREME COURT HAS RATIFIED THE ESTABLISHMENT OF A BARGAINING UNIT COMPOSED OF A MINORITY OF EMPLOYEES WHERE ALL EMPLOYEES ARE SUBJECT TO THE SAME QUALIFICATIONS AND WORKING CONDITIONS." (Capitals added.)

Petitioner respectfully prays that a proper writ of certiorari be issued in proper form and substance directed to said United States Circuit Court of Appeals for the Fourth Circuit, that this cause may be reviewed and reversed, and such other relief granted as may be meet and just.

NORFOLK SOUTHERN BUS CORPORATION,

By S. BURNELL BRAGG,
(Norfolk, Va.)

JAS. G. MARTIN,
(Norfolk, Va.)

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

NORFOLK SOUTHERN BUS CORPORATION

vs.

NATIONAL LABOR RELATIONS BOARD

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

JURISDICTION

Jurisdiction is shown definitely in the petition.

STATEMENT OF THE CASE

Norfolk Southern Bus Corporation operates motor buses in Virginia and North Carolina, some buses running altogether in Virginia, some altogether in North Carolina; and some running between points to and from one state to the other. All the bus drivers and conductors have similar duties, and many of them operating in both states come into the main station at Norfolk, Virginia, and intermingle.

At the time in question, there were in all over a hundred drivers and conductors employed.

Because of the history of the development of the lines, for seniority purposes the Norfolk Southern has a Virginia Division and a North Carolina Division, but men on each division cross the state line, have the same qualifications, and are under same dispatcher and same rule book.

All these bus drivers and conductors obviously must be treated alike and paid alike to have peace and satisfaction; and their duties are substantially identical.

In 1944, the Brotherhood of Railroad Trainmen (hereinafter called the Union) desired to unionize the Norfolk Southern men, and be the bargaining agent, and knowing full well it could not get a vote of a majority of the men, tried the so-called Virginia Division alone, claiming that an appropriate unit. In an election, the Union got 34 votes out of 64 (30 against), and was declared the bargaining agent, over protest of Norfolk Suthern which claimed this was not an appropriate unit.

Norfolk Southern would not bargain with the Union, and claims the unit plainly not appropriate, arbitrary and illegal.

Thereafter, an unfair practice proceeding was brought against Norfolk Southern, claiming it would not bargain with the Union, and was guilty of other unfair conduct.

SPECIFICATION OF ERROR

The court erred in holding the so-called Virginia Division an appropriate unit for bargaining.

ARGUMENT

The so-called "Virginia Division" of the drivers and conductors was not an appropriate unit for bargaining, but an arbitrary, improper unit.

Norfolk Southern objects to 34 men controlling over a hundred.

As all its drivers and conductors have substantially identical duties, intermingle, and must all be paid alike and treated alike, to have justice, peace and good feeling; there is no sound reason for having a bargaining unit of the Virginia Division. The Board has expressly admitted that the facts "point up the equal propriety of a company-wide unit", but claims that the Virginia Division at present is also an appropriate unit.

We submit that neither reason nor authority justifies this Virginia Division for a bargaining unit. The mere fact that there are different bus masters in Virginia and North Carolina, and different seniority lists, is no more sound reason than because there are different ticket offices. There is no better reasoning, we submit, for a Virginia Division bargaining unit, than there would be for a Virginia Beach unit, or any other arbitrary unit of part of an identical craft. We submit that it is almost as arbitrary as if a unit were created of men named "Smith" or "Jones". In the case at bar, the drivers and conductors are in nowise distinctly separate, but many of them come into the same stations and intermingle.

The Supreme Court said in the recent case of *May Department Stores Company* v. *N. L. R. B.*, 326 U. S. 376, 90 L. Ed. 131:

> "It had testimony as to similarity and dissimilarity in tailoring and altering *between the men's and women's alteration room.* There was evidence that those who work on men's clothing, speaking generally, belong to a different union organization than those who work on women's clothes. The Board considered the interchange of workers between the two groups. We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a degree of self-organization and a *special trade which sufficiently differentiated them from other employees.*" (Italics added.)

In the case at bar, there is no such special trade of the Virginia Division from the other men; and Norfolk Southern owed no duty to bargain with an improper unit.

We may add, as once stated by Mr. Justice Jackson, that besides the employer and union members, "But there is a third and, as usual a forgotten interest here—those employees who did not want to be represented by the union." In the case at bar, the great *majority* of all the drivers and conductors were against the Union.

The dissenting opinion of Judge Soper is so sound and convincing that for the convenience of the court we copy it here:

> "The Bus Company carries on its operation in two divisions known as the Virginia and

North Carolina divisions. There is, however, a close association amongst the employees of the two divisions and a single management. Both divisions run into Virginia and both divisions run into North Carolina. The busses interchange between the two divisions. A large percentage of the bus operators in both divisions have the same headquarters, report at the same place and are constantly thrown together. Some of the operators live in Virginia and some in North Carolina, but about 40 per cent of the North Carolina operators and the majority of all of them in both divisions live in Norfolk. The qualifications are the same for both divisions. Joint meetings of the employees of both divisions are held to discuss safety methods and business rules and regulations, and the drivers mingle at the Norfolk terminal and at the garage. The discipline, employment and discharge of the operators of both divisions are handled through the office of the general manager. The books and records of the operations are not kept separately for the two divisions but for the business as a whole.

"A majority of the employees in the Virginia division were in favor of the union, but the employees of the North Carolina division were opposed to union organizatin. Since it was therefore impossible to unionize the employees, if all of them in both divisions were included in a single bargaining unit, the Labor Board decided that the employees of the Virginia division,

considered separately constituted an appropriate unit for the purposes of collective bargaining. This is made quite clear by the Board's own words of explanation in giving its reasons for establishing the Virginia division as a separate bargaining unit. They were:

(1) "Each division, for example, has its own seniority list, so that if a driver transfers from one division to the other, he does not carry his seniority with him but goes to the bottom of the seniority list in his new division."

(2) "Each driver or conductor is definitely assigned to one division or the other and among regular drivers there is very infrequent interchange on a permanent basis; in case of emergency, a regular driver in one division may, on a purely voluntary basis, accept a run in the other division.".

(3) "Further, each division is in charge of a separate bus master."

The Board, however, admitted that "there are other considerations which point up the equal propriety of a company wide unit." The Board could well have said that the other considerations were far more weighty, as will appear when listed in the Board's own words as follows:

(1) "Wages and working conditions are the same for employees throughout the system."

(2) "All busses are serviced at the same garage."

(3) "The dispatcher at Norfolk acts in his capacity for the two divisions."

(4) "General administration and employment policies are handled centrally."

"Why then did the Board reject the normal and reasonable arrangement and set up the Virginia division as a separate unit? The answer is given by the Board in its own words as follows:

"However, the Union has limited its organization activities to employees of the Virginia division since those in the North Carolina division have indicated their hostility to the Union and there is no present possibility of organizing the latter division. In view of the foregoing, and in the absence of any bargaining history, we are of the opinion that at this time a unit confined to employees of the Virginia division is appropriate."

"Section 9(b) of the statute gives the Board the power to determine in each case the unit appropriate for purposes of collective bargaining to effectuate the policies of the Act; but the Act does not permit the Board to limit a bargaining unit to a certain size simply to enable the union to secure an organization in a plant which would otherwise be impossible. It is true that the preamble of the statute declares that it is the policy of the United States to encourage the practice and procedure of collective bargaining and to protect the exer-

cise by the workers of the full freedom of self organization and the designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. But Section 9(a) provides that the bargaining representatives shall be designated by the *majority of the employees* in an appropriate unit and that they shall be the exclusive representatives of the employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

"We need nothing further than these provisions to show that the unit must be one which is appropriate for bargaining in respect to wages and other conditions of employment. In this case as the Board has found, the wages and working conditions in both divisions are the same and the problems of administration are handled by the company as a whole; and the real reason for setting up the Virginia division as a separate unit was not that it is an appropriate unit for bargaining purposes, but solely to establish the union in the business against the will of the majority of the employees. What is the inevitable result? It is that the representatives of a minority will have the authority to bargain for the whole body of employees. This is true because it will be obviously impossible for the company to make any distinction between the bus operators in the two divisions since they have the same qualifications, are closely associated in the performance of their duties, and are subjected to the same conditions of labor.

"No decision of the Supreme Court has ratified the establishment of a bargaining unit composed of a minority of employees where all employees are subject to the same qualification and working conditions."

It is respectfully submitted that this important question should be reviewed and settled by this court, and the decision below reversed.

S. BURNELL BRAGG,
(Norfolk, Va.)

JAS. G. MARTIN,
(Norfolk, Va.)

Counsel for Norfolk Southern Bus Corporation.